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In the Supreme Court of the United States

OCTOBER, TERM, 1927

No. 807

THE UNITED STATES, PETITIONER

v.

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, et al.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

OPINION BELOW

The opinion of the Court of Claims (R. 13) is not reported.

JURISDICTION

The original judgment of the Court of Claims was entered January 17, 1927. (R. 7, 12.) Motion for new trial was seasonably filed and entertained and denied, and an amended judgment entered December 19, 1927. (R. 16.) Petition for certiorari was filed February 25, 1928. (R. 16.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Respondents, owners of the ship *Betsy Ross*, had a charter party for carrying a cargo of ore from New Caledonia to the United States. The Shipping Board threatened to requisition the vessel unless the owners would carry wheat for the Food Administration. The owners, rather than have their vessel requisitioned, agreed to carry wheat and entered into a charter party with the Food Administration for a stipulated freight. The question here is whether there was a requisition of the vessel or of her use, or a modification or cancellation of a contract for the building, production, or purchase of ships or material within the meaning of the Act of June 15, 1917, so as to entitle the shipowners to just compensation under the Constitution.

THE STATUTES INVOLVED

The Emergency Shipping Act of June 15, 1917 (c. 29, 40 Stat. 182), provides:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail

to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend

> the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The Executive Order of July 11, 1917, No. 2664, is as follows:

> (Delegating to the Shipping Board and the Emergency Fleet Corporation the powers granted the President by the Emergency shipping legislation.)
>
> By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process

of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

STATEMENT

The facts and assignments of error are sufficiently stated in the petition. (R. 1, 3.)

ARGUMENT

There is little to be added to the statement in the petition for certiorari of the reasons for granting the writ.

The owners of the *Betsy Ross* had a charter with third parties for the carriage of ore from New Caledonia to the United States at a stipulated freight, which would have amounted to $177,000. While the vessel was in Australia and about to sail for New Caledonia to take on her cargo of ore, the United States Shipping Board, the United States War Industries Board, and the British and Australian governments entered upon a discussion as to the desirability of requiring American-owned vessels in Australian ports to return to an American port with cargoes of wheat. As the result, the *Betsy Ross* was temporarily refused clearance papers by the Australian Government from the port of Melbourne. The owners of the vessel were notified by the Shipping Board that unless they would return with a cargo of wheat the vessel would be requisitioned. Rather than have their vessel requisitioned, the owners yielded and not only agreed to bring home a cargo of wheat, but entered into a contract with the United States Food Administration Grain Corporation to carry the wheat for a stated freight, the amount of which aggregated $63,784.00, which has been paid.

The United States did not, in fact, requisition the vessel, nor requisition her use. Its threat to do so does not constitute legal duress. If the United States had insisted on the use of the ship for wheat, and the owners of the vessel had stood on their

rights and refused the proffered freight rate, compensation for the reasonable value of the use of the vessel might then have been obtained, and the proof of the freight which would have been earned under the ore charter would have been admissible to establish the value of the use. But when the owners yielded and agreed to the use of the vessel at a stipulated freight they failed to "save the question of price," as this Court said in *American Smelting and Refining Co.* v. *United States*, 259 U. S. 75, a decision which is controlling here. The United States did not requisition anything or take anything under the power of eminent domain.

The Court of Claims proceeded on the theory that the Shipping Board had suspended and then canceled the plaintiff's contract for carriage of ore, and that the case is therefore governed by subdivision (b) of the Act of June 15, 1917. It ignored the fact that the authority granted by that statute to modify, suspend, cancel, or requisition existing or future contracts related only to contracts "for the building, production, or purchase of ships or material." It is too plain for argument that the contract between the respondents and the owners of the ore for carriage of the ore to the United States was not a contract for the building, production, or purchase of ships or material. There is nothing in the Act of June 15, 1917, which authorized the cancellation of such a contract. The

Act did authorize the requisition of ships or their possession or use, but that power, although threatened here, was not exercised.

Subdivision (e) of the Act of June 15, 1917, authorized the requisition of any ship "or charter of such ship." The ore charter was not requisitioned. To accomplish that result within the meaning of subdivision (e), it would have been necessary for the Shipping Board to take over the charter from the owners of the ore and step into their shoes and perform the contract, by having the ship carry freight under it for the United States. That, of course, was not done. If it had been, the just compensation would have been payable to the owners of the ore, not to the shipowners. The United States did not even "frustrate" the ore charter, unless inducing one man to break his contract with another is frustration.

We are quite unable to see any legal basis whatever for the judgment of the Court of Claims. The United States has uniformly declined to recognize such a claim as this. If this judgment is sustained, claims of a similar character are likely to arise. The amount of the claim in this case totals, with interest, nearly $180,000. Although the case may not be of any vast importance, and the respondents may have equities in their favor, we do not feel justified in acquiescing in a judgment for such an amount, which appears to be without any legal basis to support it.

It is respectfully submitted that the writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

J. FRANK STALEY,
Attorney.

MARCH, 1928.

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